

No. 93-1286

Supreme Court, U.S.

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

AMERICAN AIRLINES, INC.,
Petitioner,
v.

MYRON WOLENS, *et al.*,
Respondents.

On Writ of Certiorari to the
Supreme Court of Illinois

BRIEF OF *AMICUS CURIAE*
UNITED AIR LINES, INC.
IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

The questions in the Petition for a Writ of Certiorari, which this Court granted, are:

1. Does the express pre-emption clause of the Airline Deregulation Act of 1978, 49 U.S.C. App. § 1305, pre-empt only those state law claims that relate to "essential" airline operations?

2. Does the scope of pre-emption under Section 1305 depend on the form of relief requested?

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INTEREST OF *AMICUS CURIAE*

Amicus curiae United Air Lines, Inc. ("United") is one of the Nation's largest commercial airlines. It has a direct interest in the outcome of this case.¹ Like petitioner American Airlines, Inc. ("American"), United has been sued in Illinois for violation of that State's Consumer Fraud and Deceptive Trade Practice Act and for

¹ Letters reflecting written consent of the parties to the submission of this brief have been filed with the Clerk of the Court.

breach of contract, based on United's exercise of its long-standing, published rights to adjust the rules of its Mileage Plus Frequent Flier Program ("Mileage Plus Program"). See, e.g., *Silver, et al. v. United Air Lines*, No. 93 CH 11098, pending Cook Cty. Ill. Cir. Ct.; *Greenberg, et al. v. United Airlines, Inc.*, No. 94 CH 499, Cook Cty. Ill. Cir. Ct., (dismissed with leave to refile after a decision in this case). Because the Supreme Court of Illinois has failed to give full pre-emptive effect to 49 U.S.C. App. § 1305, that State has now become a hotbed for nationwide class actions against United and other airlines challenging changes to frequent flyer programs. See, e.g. *id.*; *Ryan v. Delta Airlines*, No. 88 CH 4846, pending Cook Cty. Ill. Cir. Ct. (challenging aspects of Delta's frequent flyer program) (dismissed with leave to refile after a decision in this case).

INTRODUCTION

United files this brief urging reversal of the judgment of the Supreme Court of Illinois. We will not repeat all the arguments ably presented by Petitioner American in support of reversal of the judgment below. Instead, as *amicus curiae*, we will focus and expand upon only six important propositions bearing on the resolution of this case.

ARGUMENT

I. A PRESUMPTION AGAINST PRE-EMPTION DOES NOT LIMIT THE NATURAL AND INTENDED SCOPE OF AN EXPRESS PRE-EMPTION PROVISION.

In support of the judgment below, respondents are likely to rely on the so-called "'presum[ption] that Congress did not intend to pre-empt areas of traditional state regulation.'" *Morales v. Trans World Airlines, Inc.*, 112 S. Ct. 2031, 2055 (1992) (Stevens, J., dissenting) (quoting *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 740 (1985)). In our view, this Court's prior cases establish—consistent with basic principles of democratic theory—that a presumption against pre-emption should not be applied to limit the natural and intended scope of an express pre-emption provision.

There is, in the first instance, no presumption against Congress' exercise of its enumerated powers. Courts are obligated to accord a statute supported by a constitutional grant of power its full and natural effect whether or not, by reason of the Supremacy Clause, the statute pre-empts laws regulating matters traditionally within the scope of state regulation. Thus, in determining what effect to give an express pre-emption clause, this Court has given *controlling* weight to the intent of Congress as revealed by the language, history, and structure of the statute. This is as it should be, since Congress' will, exercised within the perimeter of its constitutional power, authoritatively controls.

For example, in *Cipollone v. Liggett Group, Inc.*, 112 S. Ct. 2608 (1992), this Court held that the pre-emption provision in the 1965 version of Federal Cigarette Labeling and Advertising Act was written "precisely and narrowly," and therefore it was appropriate to apply that provision in light of a presumption against pre-emption. *Id.* at 2618. However, with respect to the 1969 version of the same Act, this Court held that because "the plain

language of the pre-emption provision in the 1969 Act is much broader," *id.* at 2619, it would be wrong to construe that provision "narrowly," *id.* at 2621, *i.e.*, in light of a presumption against pre-emption. *See also Morales v. Trans World Airlines, Inc.*, 112 S. Ct. 2031, 2037-38 (not relying on or addressing presumption against pre-emption in interpreting preemption provision of Airline Deregulation Act of 1978, in which Congress used "broad" and "deliberately expansive" language).²

Our point is this: At least in instances of *express* pre-emption by Congress,³ a so-called presumption against

² *See also Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 138 (1990) (holding that because Congress "has expressly included a broadly worded pre-emption provision" it is appropriate to apply it "expansively"); *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 96-97 (1983) (holding that, because "[t]he breadth of § 514(a)'s [of ERISA] pre-emptive reach is apparent from that section's language," "[w]e must give effect to this plain language unless there is good reason to believe Congress intended the language to have some more restrictive meaning"); *Ramah Navajo School Bd., Inc. v. Bureau of Revenue of New Mexico*, 458 U.S. 832, 838 (1982), later proceeding, 720 P.2d 1243 (N.M.), *cert. denied*, 479 U.S. 940 (1986) (holding that pre-emption analysis requires a "particularized examination" of the relevant federal law, and where federal policies require broad pre-emption, "federal law should be construed generously, and federal pre-emption is not limited to those situations where Congress has explicitly announced an intention to pre-empt state activity").

³ A presumption against pre-emption has more bite when the issue is whether Congress has *impliedly* pre-empted state law. *See, e.g., Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 146-52 (1963) (applying presumption against pre-emption where party argued implied pre-emption of state law); *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 236-37 (1947) (same). In the implied pre-emption context, it is reasonable for the courts to assume that Congress did not intend to disable the States from acting unless there is some affirmative indication otherwise. However, where Congress has included an express pre-emption provision, the plain and natural effect of the language chosen by Congress should control, and there is less, if any, role for a "thumb on the scale" in the form of a presumption against pre-emption.

preemption carries little or no water divorced from the intent of Congress, as revealed by the language, history, and structure of the provision in question. Or, as the Court put it *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 138 (1990), "[t]he purpose of Congress is the *ultimate touchstone*," in determining whether a pre-emption provision will be broadly or narrowly construed. This is but another way of saying that Congress' will, once discerned through the traditional interpretative process, must be faithfully enforced. Thus, where, as here, Congress has drafted a pre-emption provision using purposefully broad language (*i.e.*, "any law" "relating to" rates, routes or services, 49 U.S.C. App. § 1305(a)(1)), *see Morales*, at 2037-38, a presumption against pre-emption cannot be applied to limit the reach of Congress' intended action—namely, to effect broad pre-emption.⁴

II. THE TERMS OF FREQUENT FLYER PROGRAMS ARE PLAINLY PART OF THE "RATES, ROUTES, OR SERVICES" OF AIR CARRIERS.

The critical issue, then, is Congress' intent, as conveyed by the language of the statute. As we discuss below in Parts II-IV, the unambiguous and expansive language in section 1305(a)(1) pre-empts the state-law actions at issue in this case.

⁴ There is another reason why it would be inappropriate to apply in this case a "presum[ption]" that Congress did not intend to pre-empt areas of traditional state regulation. *Metropolitan Life*, 471 U.S. at 740. Regulation of interstate airline rates is *not* an area of "traditional state regulation." Because, as we discuss below (and Petitioner discusses its brief), an airline's frequent flyer program is part of the "rates" charged, and "services" provided, by the airline, the subject-matter of these cases (the terms of frequent flyer programs) does not fall with an area of traditional state regulation. Prior to the enactment of the Airline Deregulation Act of 1978 ("ADA"), the federal government, not the States, regulated the rates, routes, and services of interstate airlines. Therefore, in no event, is a presumption against pre-emption applicable here.

Section 1305(a)(1) pre-empts the enforcement of any state law "relating to" the "rates, routes, and services" of air carriers. The terms of frequent flyer programs are plainly part of the "rates, routes, and services" charged by airlines.

A "rate" is "the cost per unit of a commodity or service." American Heritage Dictionary, 1027 (Rev. Ed. 1982). The terms of frequent flyer programs fit comfortably within this definition. Although the details of frequent flyer programs vary from airline to airline, their basic structure is the same: After joining the program, passengers accrue points for each flight they take. These points can be cashed in for, among other things, "free" travel or upgrades to a higher class of service. Five round trip flights from New York to Los Angeles might, for example, earn a member of the program sufficient mileage points to redeem a sixth "free" flight within the continental United States.

The economic effect of the frequent flyer award in this example is to provide a premium to the passenger to travel the first five flights. The frequent flyer award is merely a complex incentive program that is an integral part of the rate structure and services of the airlines. In any meaningful economic sense, therefore, the terms of frequent flyer programs are part of the "rates" charged and "services" provided by a major air carrier.

The common-sense economic understanding of the terms of frequent flyer programs as part of the overall "rates" charged by airlines is confirmed by the actions of one of the relevant government agencies formerly charged with enforcing the ADA—the Civil Aeronautics Board ("CAB")—interpreting both the ADA and related legislation:

First, when the ADA was passed, the CAB issued an order interpreting the scope of pre-emption under § 1305 (a)(1). In that order, the CAB expressly concluded that "preemption extends to all of the economic factors that

go into the provision of the *quid pro quo* for passenger's fare . . . and we hereby occupy these fields completely." 44 Fed. Reg. 9948, 9951 (1979). This interpretation is entitled to deference under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, *reh'g denied*, 468 U.S. 1227 (1984). As discussed above, the terms of a frequent flyer award are one of the "economic factors" that affect the true fare paid by the passenger, and are thus part of the "rate" charged by the airline with the meaning of the CAB interpretation of the statute.

Second, this understanding is also consistent with the CAB's interpretation of related legislation—the Federal Aviation Act ("FAA"). Section 1108(b) of the FAA generally forbids foreign air carriers from taking on, "at any point within the United States, persons, property, or mail carried for compensation or hire and destined for another point within the United States." 49 U.S.C. § 1508(b). In 1983, Trans World Airlines and Qantas Airways filed for CAB approval of an agreement that allowed Qantas' passengers to participate in TWA's Frequent Flight Bonus Program. The agreement included provisions of Qantas to provide, as an award on TWA's program, transportation between the West Coast of the United States and Hawaii.

In disapproving the airlines' agreement, the CAB rejected the argument that "free" award travel was not for compensation and therefore not prohibited by the act. The CAB found that "[c]onsumers pay the carriers not only in return for specific transportation services but also in anticipation of some future benefit." U.S. Civil Aeronautics Board, Order 84-2-61. 106 C.A.B. 351 (February 14, 1984), at 2. The CAB thus recognized, once again, that the possibility of future free air travel is part of what consumers pay for a flight, and is thus part of the "rate" charged by airlines.

Moreover, the treatment of frequent flyer programs under a *regulatory* regime further confirms that the terms

of such programs are part of the "rates, routes, or services" of air carriers. Those foreign governments that require the filing of airline tariffs generally also require the filing of frequent flyer award program schedules.⁵ Similarly, in the United States, even after the passage of the ADA, Department of Transportation regulations mandate the filing of rates, fares and services for *foreign* air transportation.⁶ 14 C.F.R. § 221.3. Since the introduction of frequent flyer bonus programs in 1981, airlines have voluntarily filed award bonuses in their tariff with the Department of Transportation. Indeed, Department of Transportation Order 89-9-25 confirms that "both the CAB and the [DOT] have accepted [frequent flyer award bonuses] as appropriate binding tariff material consistent with the well-established practice of filing air fare discounts." U.S. Department of Transportation Order 89-9-25 (Sept. 13, 1989), 1989 WL 25637, *1 (D.O.T.), at 4. The fact that foreign governments require such tariffs to include information regarding the award schedule of frequent flyer programs, and the U.S. Department of Transportation, in certain circumstances, accepts such information as appropriate tariff materials, tends to confirm that the terms of those programs are part of the "rates, routes, and services" of air carriers.

In sum, both common-sense economics and the prior interpretations of relevant government agencies make

⁵ See, e.g. generally U.S. Dept. of Trans. Order No. 91-6-29 (June 25, 1991), 1991 WL 248400 (D.O.T.) (dismissing complaint filed by Air France against Pan American World Airways for failure to file cash bonus offer as tariff with the Government of France).

⁶ "Foreign air transportation" is defined as "the carriage by aircraft of persons or property as a common carrier for compensation or hire . . . in commerce between . . . a place in any State of the United States, or the District of Columbia, and a place in any other State of the United States, or the District of Columbia; or between places in the same State of the United States through the airspace over any place outside thereof; or between places in the same Territory or possession of the United States, or the District of Columbia. . . ." 49 U.S.C. App. § 1301(24)(a).

clear that the terms of frequent flyer programs are part of the "rates, routes, or services" of air carriers within the meaning of the ADA. Therefore, as we discuss below, a state-law action challenging changes to those terms is preempted by § 1305(a)(1). See Part IV, *infra*. That should end this case.

III. FREQUENT FLYER PROGRAMS ARE AN IMPORTANT PART OF AIRLINE PRICING IN A DEREGULATED MARKET, PROVIDING HEAVILY-REDUCED FARES TO TRAVELLERS. WITHOUT THE ABILITY TO ADJUST PERIODICALLY THE TERMS OF THEIR FREQUENT FLYER PROGRAMS, THE AIRLINES WOULD BE UNABLE TO OFFER SUCH HEAVILY-REDUCED FARES.

Frequent flyer programs are an important part of how airlines in a deregulated market provide heavily-reduced fares to travellers. Such reduced fares are the hallmark of airline pricing in a deregulated free market. While some passengers may miss the days of half-empty flights under a regulated fare structure, it is the ability of airlines to fill their planes with discount seats that has led to the significant overall reduction in airfares under deregulation.

The economics of air travel require the plane to be filled with passengers who pay radically different prices. As this Court noted in *Morales*, the expenses involved in operating an airline flight are almost entirely fixed costs—they increase relatively little with each additional passenger. See 112 S. Ct. at 2040. Fully utilizing capacity is therefore the key to keeping airfares low as it is the only way to reduce the actual "average" cost per passenger.

If airlines charged all customers this average price, however, many seats would go empty and prices would have to be higher to cover costs. Many consumers would not fly, even though they would willingly pay the actual (i.e., marginal) cost of their transportation. Airlines would

also not be able to offer as many flights as they do now, further inconveniencing passengers and driving up costs.

Reaping the benefits of deregulation requires differentiating those passengers who need, and are willing to pay for, frequent flights without advance purchase from those customers who do not value this flexibility so highly. The shorthand for this distinction is often made between "business" travellers on the one hand and "leisure" travellers on the other.⁷ For the airlines to be able to offer substantially lower fares to "leisure" travellers, they must be able to restrict those fares to flights where there are likely to be more empty seats and to adjust regularly those restrictions to shifting demand, cost, and other market forces.

By controlling the allocation of the frequent flyer discounts—using them primarily to fill seats that would otherwise go empty—the airlines are able to transport millions of leisure travellers annually at very low cost. Frequent flyer programs provide one of the most popular⁸ and heavily-reduced fares and generally do so, as one would expect, with greater restrictions than most reduced fares. This reduction, like all market prices, strikes a mutually beneficial balance between the cost of the item produced and value of the benefit received. The airlines are able to reduce their costs by retaining a large degree of flexibility in the amount of the awards and when and how they may be redeemed. The consumer, who bears a certain amount of disclosed risk about the precise value of the future

⁷ The "business" versus "leisure" traveller distinction is merely a shorthand for the distinction between those passengers who are able and willing to pay significantly more for the convenience of more frequent flights with no advance purchase and those who are not. Of course, many business travellers also rely on the availability of lower fares.

⁸ On average, approximately 8.5% of the passenger miles flown on United are paid for with frequent flyer points. On some flights more than half of the passengers fly with frequent flyer awards.

benefit of his mileage credits,⁹ nevertheless benefits not only from the deep reduction in fare, but also from the significant discretion he maintains as to when and how he will redeem the miles.

The dynamic of heavily-reduced fares available through frequent flyer membership simply would not work if the airlines were not able to adjust periodically the terms of the frequent flyer programs in light of evolving demand and cost factors. Airlines must be able to adjust the number of seats on a particular flight available to be paid for with frequent flyer awards in light of shifting market demand. They must also be able to adjust the so-called "blackout" dates—those dates on which few seats are likely to be empty, and thus certain frequent flyer awards cannot be used—to changing demand. Finally, the airlines must be able to manage, to some degree, the timing and volume of frequent flyer redemptions over a period of time so that costs do not at any time greatly exceed revenues. In short, without the ability to adjust periodically the terms of their frequent flyer programs, the airlines would simply be unable to maintain such programs, at least in their current form, and provide maximum fare reduction to consumers.

Indeed, that is essentially what the Department of Transportation found when it rejected a challenge to the airlines' right to modify the terms of frequent flyer programs. The Department concluded that reserving the right to modify program rules and imposing capacity controls and blackout dates "seem to be legitimate methods for controlling the cost of frequent flyer plans." U.S. Dept.

⁹ Such uncertainty would be inherent in frequent flyer programs even if airlines could not unilaterally change program rules or impose blackout or other capacity constraints. The value of award travel is affected by a host of factors that even respondents do not seek to regulate. When an airline expands its route system to a popular destination, for example, the value of miles is increased. When market forces drive down the price of other discount fares, the value of "free" travel decreases.

of Transportation Order 92-5-60 (May 29, 1992), 1992 WL 133179, *7 (D.O.T.). The Department found that "[w]ithout such restrictions, carriers might choose to terminate or cut back the programs." *Id.*

In short, in order to maintain the complex and heavily-reduced fare structure embodied in the frequent flyer programs, the airlines must periodically adjust the terms of those programs.

IV. STATE-LAW ACTIONS CHALLENGING CHANGES TO THE TERMS OF FREQUENT FLYER PROGRAMS PLAINLY "RELAT[E] TO" THE ROUTES, RATES, OR SERVICES OF AIRLINES, AND ARE THEREFORE PRE-EMPTED BY SECTION 1305(a)(1).

Section 1305(a)(1) pre-empts the enforcement of any state law "relating to" the rates, routes, or services of air carriers. In *Morales*, this Court held that the "key phrase" in the statute—"relating to"—expressed a "broad pre-emptive purpose" and was meant by Congress to be "deliberately expansive." 112 S. Ct. at 2037 (internal citation omitted). The Court held that all "[s]tate enforcement actions having a connection with or reference to airline 'rates, routes, or services,' are pre-empted under 49 U.S.C. App. § 1305(a)(1)." *Id.*

Under this standard, it is quite plain that a state-law action challenging an airline's adjustment of the terms of its frequent flyer program is pre-empted.

At the most fundamental level, a state-law action challenging adjustments to the terms of a frequent flyer program is pre-empted *merely because* the terms of a frequent flyer program are, as we discuss above in Part II, part of the "rates" charged and the "services" provided by airlines. Thus, by its very nature, an action challenging changes to the terms of a frequent flyer program challenges the "rates" and "services" of the airline, or at the very least, "ha[s] a connection with or reference to" air-

line "rates, routes, or services," which all that is necessary under § 1305(a)(1) to pre-empt state law.

In our view, it is not necessary even to show that the state-law action would have a significant impact on the "rates" or "services" airlines. That is so because, as this Court expressly recognized in *Morales*, a pre-emption clause extending to all state laws "relating to" rates, routes, or services is much broader than one that is limited to state laws that "regulate" rates, routes, and services. 112 S. Ct. at 2037-38. The key statutory phrase ("relating to")—defined by this Court in *Morales* as "'to stand in some relation; to have bearing or concern; to pertain; refer; to bring into association with or connection with,'" 112 S. Ct. at 2037 (quoting Black's Law Dictionary, 1158 (5th Ed. 1979)—pre-empts not only those actions shown to have a significant impact on rates (and thereby "regulating" them), *but also* those actions that merely "have [some] connection" to airline rates or services, even if it is not certain whether the action will significantly impact the rates. By choosing the broad "relating to" language, Congress intended to err on the side of keeping the states out of the area of "rates, routes, and services" *completely*, rather than requiring a case-by-case showing of the impact of the state law on those items.

Thus, one of the two key distinctions relied on by the Illinois Supreme Court—that an action for damages (as opposed to an action for injunctive relief) does not impact the rates or services of airlines directly enough to be pre-empted—is not merely wrong (as Petitioner thoroughly demonstrates), it is also largely irrelevant.¹⁰ The

¹⁰ The other reason relied on by the Illinois Supreme Court to avoid pre-emption—that frequent flyer programs have not, historically, been "essential" to airline operation—is also plainly wrong. There is no support in the language of § 1305(a)(1) for the proposition that Congress intended to keep the States out of only the most essential aspects of airline operations. To the contrary, reading into the statute an "essential to operations" limitation is thoroughly contrary to the "deliberately expansive" language chosen by

key "relating to" language is broad enough to cover any state-law action having some real connection with airline rates, routes, or services, whether or not the airlines can demonstrate in the case at hand that the state-law action will have a significant impact on their rates, routes, and services. That is the clear import of the "broad," "sweep[ing]," and "deliberately expansive" language, *Morales*, 112 S. Ct. at 2037, chosen by Congress.

Even if, however, it were necessary to show "as an economic matter" that state-law actions challenging adjustments to the terms of frequent flyer programs had some "forbidden significant effect upon fares," see *Morales*, 112 S. Ct. at 2039, such a showing is easily made in this case. The actions in this case challenge American Airlines' decision to exercise its reserved right to adjust the number of seats set aside for AAdvantage members and the "blackout" dates on which certain kinds of AAdvantage frequent flyer awards can be used. See, e.g., *Wolens v. American Airlines*, Complaint, paragraph 4; App. 50a; *Tucker v. American Airlines*, Complaint, paragraph 14; App. 65a. Similarly, in the cases in which *amicus* United is involved, the plaintiffs challenge United's adjustments to the terms of its Mileage Plus program with respect to the number of miles required to earn award travel, notwithstanding United's express reservation of the right to make such changes in its published Mileage Plus rules. See, e.g., *Silver, supra*; *Greenberg, supra*.

As we have described above in Part III, without the ability to adjust periodically the terms of their frequent flyer programs to accommodate changes in demand for specified routes and other factors, the airlines would be unable to maintain the popular frequent flyer programs, at least at the size and generous award levels that cur-

Congress. *Morales*, 112 S. Ct. at 2037. Moreover, such a limitation, which ties forbearance by the States to an historical notion of what was essential to airlines "rates, routes, or services" is contrary to one of the overall objectives of the ADA, which was to promote new and innovative fare structures by deregulating them.

rently exist. Indeed, as noted, the Department of Transportation has previously found that periodic revisions to the terms of frequent flyer programs are "legitimate methods for controlling the cost of [such] plans," and that without the right to make such changes, the airlines might well be required to "terminate or cut back the programs." U.S. Department of Transportation, Order 92-5-60 (May 29, 1992), 1992 WL 133179, *7 (D.O.T.). Thus, if Respondents' actions were allowed to go forward and possibly prevail, the nature and scope of the airlines' frequent flyer awards would necessarily change. Since (as we have described) frequent flyer awards are merely part of the innovative "rate" structure and "services" of the airlines, the changes affected by Respondents' actions would necessarily have the forbidden impact on the airlines' "rates, routes, or services."

Indeed, in *Morales*, this Court relied on the very same sort of economic reasoning, based on "the dynamics of the air transportation industry," to invalidate the National Association of Attorneys General's ("NAAG") restrictions on airline fare advertisements. 112 S. Ct. at 2040. The Court noted that in order to be able to offer lower fares to price-conscious travellers, the airlines must be able to place substantial restrictions on the availability of the lower-priced seats and must be able to advertise the lower fares. The Court found that the NAAG restrictions of advertisement burdened the ability of the airlines to place the sort of restrictions necessary to be able to offer price-conscious travelers lower fares, and therefore was pre-empted. See *id.*

Here, precisely the same dynamic is operating: If Respondents' actions were allowed to go forward, they would substantially burden the ability of the airlines to offer the current heavily-reduced fares represented by existing frequent flyer programs. In that sense, the current actions would, as least as much as the NAAG guidelines invalidated in *Morales*, have a forbidden impact on

the "rates, routes, or services" of the airlines. Therefore, they are clearly pre-empted by section 1305(a)(1).

V. STATE-LAW ACTIONS CHALLENGING ADJUSTMENTS TO THE TERMS OF FREQUENT FLYER PROGRAMS WOULD MORE CLEARLY FRUSTRATE THE GOALS OF THE ADA THAN THE LAWS FOUND PRE-EMPTED IN *MORALES*.

As this Court noted in *Morales*, the primary purpose of the ADA was to promote "efficiency, innovation, and low prices" for "variety [and] quality . . . of air transportation services" through "maximum reliance on competitive market forces." 112 S. Ct. at 2034. With respect to § 1305(a)(1) in particular, the CAB has noted that the statute was meant to further the two important objectives of "preventing State economic regulation from frustrating the benefits of decreased Federal regulation," and "preventing conflicts and inconsistent regulations" 44 Fed. Reg. 9948-49 (quoting H. Rep. No. 95-1211, at 16). The actions at issue here—state-law challenges to an airline's exercise of its right to adjust the terms of its frequent flyer program—would frustrate these goals *far worse* than the laws found by this Court in *Morales* to be pre-empted.

First, the laws found to be pre-empted in *Morales*—NAAG guidelines governing the content and format of airline advertising—did not relate to airline "rates, routes, and services" as directly as the laws at issue here. Rather, in *Morales*, the advertising guidelines were one step removed from the forbidden subjects, relating only to the *advertisement* of rates and other matters. Here, by contrast, the state-law actions at issue relate *directly* to one important aspect of the current, innovative rate and service structure of airlines—the frequent flyer programs. Thus, the state law interference with the federally-mandated deregulatory regime is more direct than it was in *Morales*.

Second, at least the NAAG guidelines in *Morales* attempted to impose uniformity on the States in their at-

tempt to regulate airline advertisements. Here, by contrast, potential causes of action against the airlines for changes to the terms of their frequent flyer programs will vary widely from state to state based on differences in the States' common and statutory laws. Thus, for example, some States—namely, those States that still maintain a more Willistonian view of contracts—would allow the airlines to develop and maintain more ambitious frequent flyer programs that depend on the airlines' ability to reserve the right to make changes to such programs. Other States, however, where traditional notions of contract law are more completely dead (and modern quasi-tort law notions like unconscionability and fundamental fairness reign), would more severely restrict the airlines' ability to maintain ambitious frequent flyer programs.

The result of such balkanization is not merely "conflicting and inconsistent regulations," which (as the CAB has pointed out, 44 Fed. Reg. 9948 (Feb. 15, 1979) is an evil that § 1305(a)(1) was intended to prevent, *but also* suppressed innovation by airlines *nationwide*. Air transportation is true interstate commerce. It is impossible to maintain different frequent flyer programs for each State. Thus, if the States are allowed to regulate frequent flyer programs through common law and statutory causes of action, then the airlines will necessarily be forced to comply with *the most restrictive* State's law. The result is that the airlines will be bound by what might be called a "least common innovator" rule with respect to frequent flyer programs and their concomitant heavily-reduced leisure fares. That would frustrate, on a nationwide scale, the core purposes of the ADA.

Respondents may argue that it would not frustrate the objectives of the ADA merely to allow them to bring an action for damages for breach of alleged "contractual" obligations assumed by the airlines in their frequent flyer programs because such an action merely enforces bar-

gains voluntarily entered into by the airlines.¹¹ This argument fails for three different reasons:

First, and entirely dispositive, a breach of contract action relating to the "rates, routes, and services" of air carriers falls squarely into the purposefully broad language chosen by Congress in § 1305(a)(1). It is the "enforce[ment]" by the state court system of the common "law" of contracts with respect to a matter relating to the rates, routes, or services of the airlines.

Second, the argument that the kind of breach of contract action at issue here is not pre-empted elevates form over substance. The gravamen of actions such as Respondents' is a challenge to the airlines' right to make adjustments to their frequent flyer programs *even where the airlines have reserved the right to make such changes*. For example, the reservation of rights contained in the United Mileage Plus Program simply could not be more explicit and thorough,¹² yet it has been the object of state-

¹¹ In these actions, the airlines take the position that the frequent flyer programs create no contractual obligations. Indeed, that is the plain import of the reservations of rights contained in most programs. *See infra* n.13.

¹² The Mileage Plus rules expressly reserve United's right to make adjustments to the terms of the program, even though those changes may affect the value of mileage already accrued:

United has the right to terminate the program, or to change the program rules, regulations, benefits, conditions of participation, or mileage levels, in whole or in part, at any time with or without notice, even though changes may affect the value of the mileage or Certificates already accumulated. United may, among other things, withdraw, limit, modify or cancel any award, increase mileage or number of Certificates required for any award, modify or regulate the transferability of awards or benefits, add an unlimited number of blackout days, or limit the number of seats available to any or all destination. Members, in accumulating mileage or Certificates, may not rely on the continued availability of any award or award level, and members may not be able to obtain all offered awards or to use awards to all destinations or on all flights.

July 1988 Mileage Plus Program Rules ¶ 1, Terms and Conditions.

law contract actions. What Respondents *really* challenge in these actions, based on modern so-called "contract" notions, is the right of the airlines to offer a frequent flyer program while reserving the right to make changes based on notions of commercial fairness. As we have discussed, if such actions are allowed to proceed, the airlines will be unable to maintain the innovative fare and service structures embodied in the frequent flyer programs. *See supra* Part III. That is what is at stake in these cases, not the right to enforce voluntary contractual obligations having nothing to do with "rates, routes, or services."

Finally, it would both be impractical and frustrate the will of Congress to allow the state courts to attempt to determine which actions merely attempt to enforce voluntary "contractual" obligations assumed by the airlines and which actions, in substance, challenge directly the right of the airlines to offer an innovative fare or incentive structures such as the frequent flyer programs. That, we suggest, is precisely the situation that Congress sought to avoid when it chose the "deliberately expansive" language of § 1305(a)(1). Congress sought to pre-empt state regulation *completely* in the area of airline rates, routes and services, rather than to allow the state courts to draw lines between various different state-law causes of action challenging matters falling within the prohibited subjects.

VI. THE PRE-EMPTION OF STATE LAW DOES NOT LEAVE THE CONDUCT OF THE AIRLINES UNCHECKED IN THIS AREA.

Finally, holding that the state-law actions at issue in these cases are pre-empted does not leave unchecked the airlines' conduct with respect to the operation of frequent flyer programs. To the contrary:

First, as this Court expressly noted in *Morales*, the fact that Congress pre-empted the application of state commercial laws to matters relating to airline rates, routes, or services "does not give airlines carte blanche to lie to

and deceive consumers." 112 S. Ct. at 2040. Rather, as the Court noted, "the DOT retains the power" to prohibit the airlines from engaging in fraudulent practices. *Id.* In its brief, Petitioner thoroughly reviews the DOT's enforcement powers, and we will not repeat that discussion here.

Second, in addition to DOT enforcement powers, the market itself guards against unfair or otherwise egregious conduct by the airlines. The airlines compete vigorously with respect to the terms of their frequent flyer programs. Just as market forces periodically propel the airlines into "fare wars," the airlines' frequent flyer programs periodically engage in "mileage wars."¹³ The upshot of this vigorous competition is that no airline is likely to get away with deceptive and unfair practices with respect to the terms of their frequent flyer programs. This sort of market check is precisely what Congress envisioned when, in passing the ADA, it determined that "'maximum reliance'" should be placed on "'competitive market forces.'" *Morales*, 112 S. Ct. at 2034 (quoting 49 U.S.C. App. §§ 1302(a)(4), 1302(a)(9)).

¹³ For example, in 1987, Delta introduced a triple-mileage program where, for a limited time, certain flights would earn three times the usual credit. See "Latest Frequent Flyer Deals Garner Praise," 299 *Aviation Daily* 25:247 (February 5, 1990). Most other airlines matched this price reduction within days. In January, 1990, the airlines launched another round of triple-mileage promotions. See "Airline Freebies Upset Business," Gannet News Service, January 30, 1990. More recently, a spate of European and Asian carriers have introduced variants of frequent flyer programs to compete with the U.S. carriers. See, e.g., "New European Frequent Flyer Programs," *International Herald Tribune*, July 24, 1992; "European Airlines Launch Frequent Flyer Programs," October, 1991 *Airline Business* 34. "Asia Drawn Into Line; Quantas' New Frequent Flyer Program Causes Intense Competition In The Asian Air Travel Market," October 1992 *Airline Business* 41.

CONCLUSION

For all the reasons stated herein, and in Petitioner American's brief, the judgment of the Supreme Court of Illinois should be reversed.

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